Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–167 OF 2006
LOW HOP BING, ZAINUN ALI AND ABDUL MALIK ISHAK JJCA
11 DECEMBER 2009

Contract — Building contracts — Subcontract — Completion of work by subcontractor — Claim for work done — Whether payment claimed by subcontractor subject to 'pay when paid' clause — Whether subcontractor entitled for payment only upon main contractor receiving payment from employer — Whether 'progress payment' includes final payment

Contract — Construction — Subcontract — 'Pay-when-paid' or 'back-to-back' clause — Intention of parties — Whether discovered from document itself — Whether evidence admissible to show words were to be understood in some technical or special sense — Whether contract must be interpreted without reference to pre-contractual negotiations or subsequent dealing between parties

Contract — Interpretation — Objective intention of contracting parties — Building contracts — Subcontract — 'Progress payment' — Whether includes final payment — Whether subcontractor entitled to payment only after main contractor paid by employer

The plaintiff was the nominated subcontractor to build, inter alia, a swimming pool for a 161-unit condominium in Seremban. The defendant had earlier entered into a main contract with the developer ('the employer') to build the condominium as the main contractor. The plaintiff completed the swimming pool but had not been fully paid by the defendant, as the employer had not paid the defendant. Pursuant to the main contract, the defendant had commenced an action against the employer to recover the agreed sum. Under the subcontract, the plaintiff commenced the present action against the defendant to recover the unpaid sum. The sessions court had allowed the plaintiff's claim with costs. On appeal to the High Court, the defendant's appeal was allowed with costs. Aggrieved by the decision of the High Court, the plaintiff now appealed to the court. The plaintiff submitted that pursuant to the subcontract, the final payment claimed by the plaintiff was outside the 'pay when paid' provision expressed in cl 13.01 of the subcontract, as it referred to 'progress payment/interim payment' only. The defendant however, contended that the final payment claimed by the plaintiff was only due and payable upon receipt of such payment by the defendant

from the employer, because the expression 'progress payment' in cl 13.01 covers final payment. The central issue before the court was on the true construction of cl 13.01, particularly the expression 'progress payment' and whether the final payment claimed by the plaintiff fell within the ambit of 'progress payment'.

Held, dismissing the appeal with costs:

(1) (per **Low Hop Bing JCA**) In ordinary parlance, 'progress payment' portrays any payment according to 'progress' ie, the forward movement of the works. 'Progress payment' clearly includes a payment at any stage, from the first stage, to the second stage, culminating in the final stage ie the final payment. Upon the true construction of cl 13.01, in particular the expression 'progress payment', it was sufficiently wide to include the final payment claimed by the plaintiff. The plaintiff was only entitled to payment after the defendant had been paid by the employer (see para 25).

(2) (per **Abdul Malik Ishak JCA**) The effect of a 'pay-when-paid' clause will be entirely a matter of construction, requiring clear and unambiguous words, and requiring careful consideration of whether, on a true construction, the clause affects the right to payment or only the time for payment. The words generally are to be understood in their plain and literal meaning. This is, of course, always subject to admissible evidence being adduced to show that the words are to be understood in some technical or special sense (see paras 47–48).

(3) (per **Abdul Malik Ishak JCA**) There was no necessity to adduce any evidence to interpret cl 13.01 because the words appearing in the clause are rather plain and they clearly preclude the defendant from paying immediately to the plaintiff unless the defendant receives payment from the employer (see para 48).

(4) (per **Abdul Malik Ishak JCA**) In construing a written contract the professed object of the court was to discover the mutual intention of the parties. The intention of the parties must be ascertained from the document itself. Thus, the parties themselves cannot give direct evidence to show that their intentions were at variance with the provisions of the contract document. The task of the court is quite simple namely, to construe the contractual term without any preconception as to what the parties intended. When the minds of the parties are expressed in an unambiguous manner, the principles of construction which are at best only a guide in the search for the intention of the parties cannot be relied upon to override the declared intention of the parties unequivocally expressed in the contract document (see paras 50–51).

A **[Bahasa Malaysia summary**

Plaintif merupakan subkontraktor yang dicalonkan untuk membina, antara lain, sebuah kolam renang bagi satu 161 unit kondominium di Seremban. Defendan telah terlebih dahulu menandatangani suatu kontrak utama dengan pemaju ('majikan') untuk membina kondominium tersebut sebagai
B kontraktor utama. Plaintif siap membina kolam renang tersebut tetapi tidak dibayar sepenuhnya oleh defendan, kerana majikan masih belum membayar defendan. Berikutan kontrak utama tersebut, defendan memulakan suatu tindakan terhadap majikan untuk mendapatkan jumlah yang telah dipersetujui. Di bawah subkontrak tersebut, plaintif memulakan tindakan ini
C terhadap defendan untuk mendapatkan jumlah yang belum dibayar. Mahkamah sesyen membenarkan tuntutan plaintif dengan kos. Semasa rayuan ke Mahkamah Tinggi, rayuan defendan dibenarkan dengan kos. Tidak berpuashati dengan keputusan Mahkamah Tinggi, plaintif kini merayu ke mahkamah ini. Plaintif berhujah bahawa berikutan subkontrak tersebut,
D bayaran akhir yang dituntut oleh plaintif tidak termasuk dalam peruntukan 'pay when paid' dalam klausa 13.01, kerana ia hanya merujuk kepada 'progress payment/interim payment'. Walau bagaimanapun, defendan berhujah bahawa bayaran akhir yang dituntut oleh plaintif hanya akan dibayar apabila defendan menerima bayaran tersebut daripada majikan,
E kerana istilah 'progress payment' dalam klausa 13.01 termasuklah bayaran akhir. Isu utama di hadapan mahkamah ini ialah pentafsiran klausa 13.01, terutamanya istilah 'progress payment' dan sama ada bayaran akhir yang dituntut oleh plaintif terangkum dalam 'progress payment'.

F **Diputuskan**, menolak rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR**) Dalam bahasa biasa, 'progress payment' menunjukkan apa-apa bayaran berikutan 'progress' iaitu, perkembangan kerja-kerja yang dilakukan. 'Progress payment' jelas
G termasuk bayaran pada mana-mana peringkat, daripada peringkat pertama, hingga peringkat kedua, berkesudahan dengan peringkat akhir iaitu bayaran akhir. Melihat kepada tafsiran klausa 13.01, terutamanya istilah 'progress payment', ia adalah meluas hingga merangkumi bayaran akhir yang dituntut oleh plaintif. Plaintif hanya berhak ke atas
H bayaran selepas defendan dibayar oleh majikan (lihat perenggan 25).

(2) (oleh **Abdul Malik Ishak HMR**) Kesan klausa 'pay-when-paid' adalah berdasarkan pentafsiran, yang memerlukan perkatan jelas dan nyata, dan juga memerlukan pertimbangan yang teliti sama ada, atas pentafsiran yang benar, klausa tersebut memberi kesan terhadap hak
I untuk pembayaran atau hanya pada masa untuk pembayaran. Perkataan tersebut harus difahami dengan maksud biasa dan harfiah. Ini, sudah tentunya sentiasa tertakluk kepada keterangan bolehterima yang dikemukakan bagi menunjukkan bahawa perkataan tersebut harus difahami dalam erti kata teknikal atau khusus (lihat perenggan 47–48).

(3) (oleh **Abdul Malik Ishak HMR**) Tiada keperluan untuk mengemukakan keterangan bagi mentafsirkan klausa 13.01 disebabkan perkataan yang tertera dalam klausa tersebut adalah biasa dan jelas tidak memerlukan defendan membayar plaintif dengan segera kecuali jika defendan telah menerima bayaran daripada majikan (lihat perenggan 48).

(4) (oleh **Abdul Malik Ishak HMR**) Dalam mentafsirkan suatu kontrak bertulis, tugas mahkamah ialah untuk mengenalpasti niat bersama pihak-pihak. Niat pihak-pihak mestilah dipastikan menerusi dokumen itu sendiri. Oleh itu, pihak-pihak tidak boleh memberikan keterangan langsung untuk menunjukkan bahawa niat mereka adalah berbeza dengan peruntukan-peruntukan dalam dokumen kontrak tersebut. Tugas mahkamah adalah mudah, iaitu untuk mentafsirkan terma kontrak tanpa apa-apa praanggapan tentang apakah niat pihak-pihak tersebut. Apabila pemikiran pihak-pihak dijelaskan secara samar-samar, prinsip-prinsip pentafsiran yang hanya dijadikan panduan dalam mencari niat pihak-pihak tidak boleh terpakai dan mengatasi niat yang telah ditegaskan oleh pihak-pihak secara jelas dalam dokumen kontrak tersebut (lihat perenggan 50–51).]

Notes

For a case on objective intention of contracting parties, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 4406.

For cases on construction generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3182–3184.

For cases on subcontract, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2997–3006.

Cases referred to

A Davies & Co (Shopfitters) Ltd v William Old Ltd (1969) 67 LGR 395, QBD (refd)

Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd [1988] 1 MLJ 500, HC (refd)

British Movietonews Ld v London and District Cinemas Ld [1952] AC 166, HL (refd)

Charter Reinsurance Co Ltd v Fagan [1997] AC 313, HL (refd)

Equitable Life Assurance Society v Hyman [2000] 3 All ER 961, HL (refd)

Hong Kong Teakwood Works Ltd v Shui On Construction Co Ltd [1984] HKLR 235, HC (refd)

Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd, (the 'Peonia') [1991] 1 Lloyd's Rep 100, CA (refd)

Iezzi Constructions Pty Ltd v Watkins Pacific (Q) Pty Ltd [1995] 2 Qd R 350 (refd)

International Fina Services AG v Katrina Shipping Ltd and Tonen, Tanker Kabushiki Kaisha, (the 'Fina Samco') [1995] 2 Lloyd's Rep 344, CA (refd)
Interpo Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd [1998] 1 SLR 694, HC (refd)
Investors Compensation Scheme Ltd v West Bromwich Building Society, Same v Hopkin & Sons (a firm) and others [1998] 1 WLR 896, HL (refd)
James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583; [1970] 1 All ER 796, HL (refd)
K Appukuttan Panicker and another v SKRAKR Athappa Chettiar AIR 1966 Kerala 303 (refd)
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235, HL (refd)
Pagnan SpA v Tradax Ocean Transportation SA [1987] 1 All ER 81, HC (refd)
Pernas Otis Elevator Co Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd & Anor [2004] 5 CLJ 34, HC (refd)
Pioneer Shipping Ltd and others v BTP Tioxide Ltd [1982] AC 724, HL (refd)
Prenn v Simmonds [1971] 1 WLR 1381, HL (refd)
Robertson and Thomas v French (1803) 102 ER East 1–6; (1803) 4 East 130 (refd)
Ryoden (M) Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd [1992] 1 MLJ 33, HC (not folld)
Schindler Lifts (Hong Kong)Ltd v Shui On Construction Co Ltd 29 BLR 98 (refd)
Slim and others v Daily Telegraph Ltd and others [1968] 2 QB 157, CA (refd)
Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473 (refd)
Society of Lloyd's v Robinson [1999] 1 WLR 756, HL (refd)
Static Control Components (Europe) Ltd v Egan [2004] 2 Lloyd's Rep 429, CA (refd)
Union of India, The v Kishorilal Gupta and Bros AIR 1959 SC 1362 (refd)
William Abbott and others v Eliza Middleton and others, George HM Ricketts v GWW Carpenter (1858) 11 ER House of Lords 7–11; [1843–1860] All ER Rep 482, HL (refd)
Zoan v Rouamba [2000] 1 WLR 1509, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 14

Appeal from: Civil Appeal No R1–12–522 of 2003 (High Court, Kuala Lumpur)

Oh Teik Keng (Oh Teik Keng & Partners) for the appellant.
T Shanmugaraj (Ngae, Shan, Kalai & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] Parties are referred to in their capacities in the sessions court.

[2] The Kuala Lumpur sessions court had allowed the plaintiff's claim with costs against the defendant.

[3] The defendant's appeal to the High Court was allowed with costs. The High Court made a further order that the judgment sum of RM271,458.29, paid by the defendant to the plaintiff, be returned to the defendant, together with interest at 8%pa.

[4] The plaintiff has now appealed to this court.

FINDING OF FACTS

[5] The facts at the trial are not in dispute. The plaintiff was the nominated subcontractor to build, inter alia, a swimming pool for a 161 unit condominium in Seremban. The defendant had earlier entered into a main contract with the developer ('the employer'), Ng Chee Yew Sdn Bhd, to build the condominium as the main contractor. The plaintiff had completed the swimming pool, but has not been paid fully by the defendant, as the employer had not paid the defendant. Pursuant to the main contract, the defendant has commenced an action against the employer to recover the sum of RM1,749,762.08. Under the subcontract, the plaintiff had filed the claim in the sessions court for the unpaid sum of RM212,989.25.

RELIANCE ON MAIN CONTRACT

[6] In the instant appeal, the plaintiff's learned counsel Mr Oh Teik Keng cited *Ryoden (M) Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33 (HC), and argued that the defendant is not entitled to rely on the main contract in order to defer the defendant's liability to pay the plaintiff.

[7] Learned counsel Mr T Shanmugaraj contended that the defendant did not attempt to rely on the main contract.

[8] In our view, the defendant's stand has rendered *Royden (M) Sdn Bhd* irrelevant.

[9] Be that as it may, we observe that in *Ryoden (M) Sdn Bhd* the defendant was employed by the employer as the main contractor for the construction of a project, Raintree Terrace. The defendant and the plaintiff entered into two subcontracts to supply, inter alia, air-conditioning and ventilation systems. Clause 2 thereof required the plaintiff to observe all the provisions of the main contract only so far as they are related and applicable to the subcontract works and were not repugnant to or inconsistent with the express provisions of the subcontract. The plaintiff alleged that the defendant had failed or refused to pay the plaintiff certain progress payments notwithstanding that such payments were duly certified by the authorised architect of the project. The plaintiff instituted the action against the defendant. The learned registrar entered summary judgment against the defendant under O 14 of the Rules of the High Court 1980. On appeal to judge in chambers, the defendant argued that the defendant was not indebted to the plaintiff on the grounds, inter alia, that cl 27(a)(vii) of the main contract specially provided that payment would be made only within 14 days after the receipt by the defendant from the employer of the amounts stated in the architect's certificate. Clause 27(a)(vii), which is a 'pay when paid' clause, was not expressly stated in the two subcontracts. Lim Beng Choon J (as then was) distinguished *Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd* [1988] 1 MLJ 500 as the wordings used in cl 11 in the subcontract therein were different from cl 11 and cl 2 in *Ryoden*.

[10] We must stress here that the reliance by the main contractor on the main contract, in particular cl 27(a)(vii), in *Ryoden*, did not help the main contractor there at all, because the 'pay when paid' provision contained in cl 27(a)(vii) was held not to be part of the subcontract. In the circumstances, we are of the view that in any event *Ryoden* is of no assistance to the plaintiff.

PAY WHEN PAID

[11] Next, the plaintiff submitted that pursuant to the subcontract, the final payment claimed by the plaintiff is outside the 'pay when paid' provision expressed in cl 13.01 of the subcontract, as it refers to 'Progress Payment/Interim Payment' only and so it is inapplicable (a reference hereinafter to a clause is a reference to that clause in the subcontract).

[12] It was contended for the defendant that the final payment claimed by the plaintiff is only due and payable upon receipt of such payment by the defendant from the employer, because the expression 'progress payment' in cl 13.01 covers final payment.

[13] The learned appeal High Court judge rejected the plaintiff's contention and held that the defendant did not incur any liability to pay the plaintiff until the defendant had actually received payment from the employer.

[14] The divergent submissions of the respective learned counsel, and the decision of the learned judge, revolve around a common denominator ie the construction of cl 13.01. The question for determination is: Upon the true construction of cl 13.01, particularly the expression 'progress payment', does the final payment claimed by the plaintiff come within the ambit of 'progress payment'?

[15] At this juncture, it is appropriate for us to refer to cl 13.01 which reads as follows:

> 13.0 **Progress Payment/Interim Payment**
>
> 13.0 Notwithstanding the provision of Clause 27 pertaining to nominated sub-contractor and the payment for works executed, it is hereby agreed that in the event of any interim certificate which includes, for nominated sub-contract works, the payment in respect of any work, 75% material or goods comprised in the sub-contract shall be made to the sub-contractor within 14 days after receipt by the Main Contractor of payment certified as due in the Interim Certificate from the Client ie Messrs Ng Chee Yee Sdn. Bhd.

[16] Clause 13.01 (or a clause corresponding thereto) is popularly known as the 'pay when paid' or back to back' clause. It deserves detailed discussion. We shall look at Hong Kong, Singapore and Malaysian judgments.

[17] In Hong Kong, cl 11(b) of the 'Green Form' sets out the 'pay when paid' provision in the following words:

> Within five days of the receipt by the Contractor of the sum included in any certificate of the Architect, the Contractor shall notify and pay to the Subcontractor the total value certified therein in respect of the Subcontractor works less certain agreed deduction.

[18] In the article entitled 'Sub-Contractors Under Threat: A Personal View' published in 'The International Construction Law Review' Vol 5, January–October 1988, Mr Robert Jewkes viewed a similar 'pay when paid' clause in Hong Kong as a 'provision to protect the main contractor against the risk of insolvency of the employer'. He considered it as a fair and sensible provision.

[19] The word 'receipt' in cl 11(b) has been construed by Hong Kong courts to mean 'actual payment, receipt of money': per Hunter J in *Hong Kong Teakwood Works Ltd v Shui On Construction Co Ltd* [1984] HKLR 235 (HC); and approved by the Hong Kong Court of Appeal in *Schindler Lifts (Hong Kong)Ltd v Shui On Construction Co Ltd* 29 BLR 98.

[20] In Singapore, the 'pay when paid' clause in the subcontract substantially incorporates cl. 11(b) of the Hong Kong model. In construing such a clause in *Brightside Mechanical & Electrical Services Group Ltd*, Thean J (of the Singapore HC), held at p 504 that, prima facie, cl 11(b) contemplated the actual receipt by the main contractor of the sum included in the certificate and that until the main contractor received from the owner the sum claimed by the subcontractor, the main contractor was not obliged to pay it to the subcontractor.

[21] A similar 'pay when paid' clause was included as cl 7(ii) of the subcontract in *Interpo Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694. Choo Han Teck JC (of the Singapore HC) held that the 'pay when paid' clause was reasonably straightforward and unambiguous, and that the plaintiff (subcontractor) was not entitled to any progress payment unless the same was received by the defendant ('main contractor') from the employer.

[22] In Malaysia, the 'pay when paid' clause came up for judicial consideration by our High Court in *Pernas Otis Elevator Co Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd & Anor* [2004] 5 CLJ 34. There, the plaintiff was the subcontractor in a project involving the construction of a hotel. The defendants were the main contractors. The plaintiff has completed the works as stipulated under the subcontract. However, the employer complained that the lifts installed by the plaintiff had caused excessive harmonic distortions. The terms of the subcontract include, inter alia, cl 2.3(g) (the 'pay when paid' clause) in the following words:

2.0 Terms of payment

2.1 ...

2.2 ...

2.3 ...

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ... and

(g) payment in respect of any work, material or goods comprised in the sub-contract shall be made within seven (7) days after receipt by the main contractor from the employer.

[23] Pursuant to cl 2.3(g), the defendants denied the liability to pay the plaintiff's claim, as they have not received payment of the sum from the employer.

[24] Ramly Ali J (now JCA), after referring to the above article, and the judgments of the Hong Kong and Singapore courts, held that the defendants' liability or obligation to pay the plaintiff arose only upon the defendant having received the payment from the employer.

[25] Reverting to the instant appeal, in ordinary parlance, 'progress payment' portrays any payment according to 'progress' ie the forward movement of the works. 'Progress payment' clearly includes a payment at any stage, from the first stage, to the second stage, culminating in the final stage ie the final payment. Upon the true construction of cl 13.01, in particular the expression 'progress payment', we are of the view that it is sufficiently wide to include the final payment claimed by the plaintiff, in which case, the plaintiff is only entitled to payment after the defendant has been paid by the employer. Hence, we are unable to sustain the submission presented for the plaintiff.

CONCLUSION

[26] On the foregoing grounds, the answer to the above question is in the affirmative. We hold that the decision of the High Court is correct. We affirm it accordingly. This appeal is dismissed with costs of RM3,000 to the defendant. Deposit to the defendant on account of the said costs.

[27] By way of postscript, we find it necessary to say that all is not lost for the plaintiff. The claim by the plaintiff, being premature, may be established by fulfilling the condition stated in cl 13.01. The payment for the plaintiff's claim is not immediate but is deferred. The plaintiff has to wait and contend with the 'pay when paid' provision in cl 13.01. Of course, we cannot express any opinion in relation to the plaintiff's claim when it eventually matures, as that claim, if any, is not before us in the instant appeal.

[28] My learned brother Abdul Malik Ishak JCA has also prepared his judgment in support of mine.

Abdul Malik Ishak JCA:

[29] This is my supporting judgment to that of my learned brother Low Hop Bing JCA. The facts have been sufficiently set out by His Lordship in his well written judgment. I am therefore spared the task of regurgitating them here. However, I shall only state the facts relevant to the issues in this appeal.

[30] Just like my learned brother Low Hop Bing JCA the parties herein would be referred to as they were referred to in the sessions court. Thus, Asiapools (M) Sdn Bhd (No Sykt 26610-U) will be referred to as the plaintiff while IJM Construction Sdn Bhd (No Sykt 104131-A) will be referred to as the defendant.

[31] Ng Chee Yew Sdn Bhd is the developer of a project known as the '*Proposed 161 Units of Condominium on PT 3844 HSD 89511 at Taman Bukit Kaya, Jalan Labu, Seremban, Negeri Sembilan*' ('the project'). The developer is referred to hereinafter as 'the employer'.

[32] The defendant was appointed by the employer as the main contractor for the project which included the swimming pool works ('subcontract works'). The main contract between the employer and the defendant as the main contractor was dated 27 June 1996 and it was according to the PAM Form.

[33] The employer nominated the plaintiff as the nominated subcontractor to execute and complete the subcontract works.

[34] And by way of a letter of acceptance dated 13 March 1996 together with a formal subcontract dated 27 July 1996, the defendant appointed the plaintiff as their nominated subcontractor for the subcontract works. The subcontract that was used was the PAM Form for a nominated subcontractor.

[35] The subcontract works were successfully completed by the plaintiff. Unfortunately, the plaintiff has not been paid fully by the defendant because the employer had not paid the defendant. Without the money coming from the employer to the defendant, the defendant was not in a position to pay the plaintiff.

[36] On the strength of the main contract, the defendant sued the employer to recover the sum of RM1,749,762.08.

[37] And by virtue of the subcontract, the plaintiff filed a claim in the sessions court against the defendant for the recovery of the unpaid sum to the tune of RM212,989.25.

[38] The Sessions Court in Kuala Lumpur gave judgment to the plaintiff with costs against the defendant. The High Court allowed the defendant's appeal with costs. The High Court also made an order that the judgment sum of RM271,458.29 paid by the defendant to the plaintiff be returned to the defendant together with interest at 8%pa. Aggrieved by the decision of the High Court, the plaintiff now appeals to this court.

[39] Is the defendant obliged to pay the plaintiff if the defendant has not received the payment from the employer? That would be the crucial question to pose. The answer is not far to seek. It is found in cl 13.01 in the letter of acceptance dated 13 March 1996 from the defendant to the plaintiff as seen at p 379 of the appeal record. It is worded as follows:

> 13.00 PROGRESS PAYMENT/INTERIM PAYMENT
>
> 13.01 Notwithstanding the provision of Clause 27 pertaining to nominated sub-contractors and the payment for works executed, it is hereby agreed that in the event of any interim certificate which includes for nominated sub-contract works, the payment in respect of any work, 75% materials or goods comprised in the Sub-Contract shall be made to the Sub-Contractor within 14 days after receipt by the Main Contractor of payment certified as due in the Interim Certificate from the Client i.e. Messrs Ng Chee Yew Sdn Bhd.

[40] There is only one meaning to cl 13.01. It is rather clear. That payment for the subcontract works can only be made upon receipt of such payment by the defendant from the employer.

[41] It must be borne in mind that the meaning of the contract, once interpreted by the court, does not change. Lord Diplock LJ explained it better in *Slim and others v Daily Telegraph Ltd and others* [1968] 2 QB 157 (CA) at pp 171–172:

> Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. But the notion that the same words should bear different meanings to different men and that more than one meaning should be 'right' conflicts with the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the 'right'

> meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it.

[42] Arden LJ in *Static Control Components (Europe) Ltd v Egan* [2004] 2 Lloyd's Rep 429, at p 435, aptly said:

> ... there are not two possible constructions in any given situation, namely a purely linguistic one and one in the light of the factual background, but only one, the true interpretation. This is because the object of interpretation is to discover the meaning of the provision in question in its context.

[43] How would a reasonable reader construe cl 13.01 as reproduced above? The approach to be adopted would be like what Lord Hoffmann advised in *Investors Compensation Scheme Ltd v West Bromwich Building Society, Same v Hopkin & Sons (a firm) and others* [1998] 1 WLR 896 (HL) at p 912:

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[44] Lord Steyn in *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961, at p 970 explained it further in his own words:

> The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.

[45] Of course, the purpose of interpretation is to ascertain the intention of the contracting parties. And this was the approach of Lord Diplock in *Pioneer Shipping Ltd and others v BTP Tioxide Ltd* [1982] AC 724 (HL) at p 736:

> The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them;

[46] Properly construed cl 13.00 may be said to be a '*pay-when-paid*' clause or '*back-to-back*' clause. A classic example of a '*pay-when-paid*' clause can be

seen in the case of *A Davies & Co (Shopfitters) Ltd v William Old Ltd* (1969) 67 LGR 395, a Queen's Bench Division case. In that case the defendant was the main contractor for the erection of a new store on JCT 63 terms, which provided for certain work to be subcontracted to a subcontractor nominated by the architect. The architect obtained a tender for this work from the plaintiff and instructed the defendant to accept it. The defendant sent an order to the plaintiff on their standard printed form, which contained on its reverse printed conditions which included a '*pay-when-paid*' clause. The plaintiff wrote thanking the defendant for the order and carried out the work. The employer became insolvent before having paid for all the work. It was held that the contract between the plaintiff and the defendant was on the basis of the defendant's printed conditions, which the plaintiff had accepted. The defendant was only liable to pay for the work in so far as he had himself been paid by the employer.

[47] I am of the view that the effect of a '*pay-when-paid*' clause will be entirely a matter of construction, requiring clear and unambiguous words, and requiring careful consideration of whether, on a true construction, the clause affects the right to payment or only the time for payment (see the Australian case of *Iezzi Constructions Pty Ltd v Watkins Pacific (Q) Pty Ltd* [1995] 2 Qd R 350; and the New Zealand case of *Smith & Smith Glass Ltd v Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473).

[48] It is a correct assertion to say that words generally are to be understood in their plain and literal meaning. This does not mean that one must refer to the dictionary in order to obtain the dictionary sense of the word. Rather the words must generally be understood (*Robertson and Thomson v French* (1803) 102 ER East, 1-6 at pp 779, 781) to mean one thing and not another. This is, of course, always subject to admissible evidence being adduced to show that the words are to be understood in some technical or special sense. Here, there is no necessity to adduce any evidence to interpret cl 13.01. The words appearing in cl 13.01 that '*the payment in respect of any work, ... shall be made to the sub-contractor within 14 days after receipt by the main contractor of payment certified as due in the interim certificate from the client i.e. Messrs Ng Chee Yee Sdn Bhd*' are rather plain and they clearly preclude the defendant from paying immediately to the plaintiff unless the defendant receives payment from the employer.

[49] Such an interpretation would not result in absurdity (*William Abbott and others v Eliza Middleton and others, George HM Ricketts v GWW Carpenter* (1858) 11 ER House of Lords 7-11 at p 67; and *Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Same v Hopkin & Sons (a firm) and others*) nor would it be inconsistent with the rest of the PAM Form for a nominated subcontractor. I would certainly refrain from concluding that

A the parties herein intended a construction that would lead to an unreasonable result (*L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) at p 251). I am mindful of the speech of Lord Steyn in *Society of Lloyd's v Robinson* [1999] 1 WLR 756 (HL) particularly at p 763 that '*in the process of interpreting the meaning of the language of a commercial document the court*
B *ought generally to favour a commercially sensible construction*'. I also heed the advice of Lord Mustill in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) particularly at p 388, where His Lordship said that '*to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made*'.
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[50] In construing a written contract, like the present case at hand, the professed object of the court is quite simple. It is to discover the mutual intention of the parties (*Pioneer Shipping Ltd and others v BTP Tioxide Ltd*
D and *International Fina Services AG v Katrina Shipping Ltd and Tonen, Tanker Kabushiki Kaisha, (the 'Fina Samco')* [1995] 2 Lloyd's Rep 344 (CA) at p 350). And the intention of the parties must be ascertained from the document itself. Thus, the parties themselves cannot give direct evidence to show that their intentions were at variance with the provisions of the contract document
E (*Prenn v Simmonds* [1971] 1 WLR 1381 (HL) at p 1385; *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd, (the 'Peonia')* [1991] 1 Lloyd's Rep 100 (CA) at p 102; *British Movietonews Ld v London and District Cinemas Ld* [1952] AC 166 (HL); and *Zoan v Rouamba* [2000] 1 WLR 1509 (CA) at p 1523). The task of the court is quite simple. It is to construe the contractual
F term without any preconception as to what the parties intended (*Pagnan SpA v Tradax Ocean Transportation SA* [1987] 1 All ER 81 at p 88, which was affirmed on appeal vide [1987] 3 All ER 565).

[51] When the minds of the parties are expressed in an unambiguous
G manner, the principles of construction which are at best only a guide in the search for the intention of the parties cannot be relied upon to override the declared intention of the parties unequivocally expressed in the contract document (*K Appukuttan Panicker and another v SKRAKR Athappa Chettiar* AIR 1966 Kerala 303). And where the intention of the parties is clear from
H the language which they have used in the agreement, like the present case at hand, and the words contained therein are clear and unambiguous, there is no scope for drawing upon hypothetical considerations or supposed intentions of the parties (*The Union of India v Kishorilal Gupta and Bros* AIR 1959 Supreme Court 1362). According to the case of *James Miller and*
I *Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; [1970] 1 All ER 796 (HL), once a contract has been considered it must be interpreted without reference to pre-contractual negotiations or subsequent dealing between the parties. The reason for this approach is easily discernible. It is purely to preserve the certainty given by written contracts.

[52] In order to give cl 13.01 of the letter of acceptance an intelligible meaning, it must be construed that the defendant is obliged to pay the plaintiff once the defendant has been paid by the employer. This is my judgment and I so hold accordingly.

[53] For these reasons, I would now make those orders as made by my learned brother Low Hop Bing JCA. The decision of the High Court cannot be faulted.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed